No. 6998.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Tony Panzich and John Arko,
Appellants,

vs.

The United States of America,
Appellee.

APPELLEE'S REPLY BRIEF.

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I.

The Court Did Not Err in Denying the Motion of the Defendants for an Instructed Verdict of Not Guilty.

The first assignment of error relied upon by the appellants herein is the denial by the court of their motion for an instructed verdict of not guilty, contending that the evidence was insufficient to support the verdict of guilty as to the appellants herein. (Appellants' Opening Brief, p. 12.)

The appellants concede that Tony Panzich was the proprietor of the cafe, and that on numerous bills or

statements in the cash register there were "B R K" items (Appellants' Opening Brief, p. 14), but insist that this is insufficient evidence of a conspiracy to violate the National Prohibition Act.

It is important to review briefly the evidence in order to show clearly the proper inferences that may be drawn from the above admissions.

The testimony of the first Government witness, S. W. Brooks [Transcript of Record, p. 21], shows that on April 30, 1931, he, with three companions, went to the Good Fellows Inn at Santa Monica; was introduced to Mr. Panzich just after entering, and was escorted to a booth by John Arko; ordered a pint of whiskey from John Arko at a price of $2.00 and received the whiskey; ordered dinner from another waiter, and when he was presented with his bill there appeared, in addition to the bill for food, the initials "B R K" and the sum $2.00—the price of the liquor. He testified that on May 4, 1931, he again went to the Good Fellows Inn in company with Federal Agent Casey, ordered whiskey from Arko, and dinner, and received a statement for food in the same manner with the food itemized at the top and the liquor itemized at the bottom as "B R K"; a charge of $2.00 was placed after the item "B R K". [Transcript of Record, p. 23.] He testified that on May 13, 1931, he returned to the Good Fellows Inn accompanied by Agent Casey, ordered a pint of liquor from a waiter whom he did not name, and a quart of wine from John Arko; that the statement again included the bill for food, the initials "B R K" and the sum of $2.00, the price of the whiskey, and an item of $2.50 for the wine; that on May 15th the

place was raided, and that he and Agent Clements entered some thirty minutes after the agents who had made the arrests, and that at that time he seized from Tony Panzich a number of statements that he had in his cash register, and that all of the statements contained "B R K" items. The bottles of liquor purchased were placed in evidence, as were the slips with the "B R K" items. (Government's Exhibit 4.)

It is admitted by the appellants that a conspiracy, as any other offense, may be proved by circumstantial evidence (Appellants' Opening Brief, p. 16), but it is contended that the testimony of the Prohibition Agents as to the purchase of liquor from certain waiters was just as consistent with the theory that these waiters were selling liquor without the knowledge or consent of the proprietor as with the theory that they were selling it with his knowledge or consent.

The jury certainly had a right to believe that Tony Panzich was the proprietor of the cafe, that the initials "B R K" referred to purchases of whiskey, and that slips bearing such initials were found in the cash register, and to draw the logical inference that the selling of whiskey was just as regular a part of the Inn's business as the selling of food, which was itemized on the same slips, and that being a regular part of the Inn's business and supplying a regular portion of the Inn's revenue was done with the knowledge of Tony Panzich, the proprietor, and done with deliberate intent.

II.

There Was No Prejudicial Error in the Court's Reading the Names of the Appellants Herein Separately, and Requiring Each to Stand in the Presence of the Witnesses for the Appellee.

The second contention of the appellants is that the court erred in requiring the defendants to stand in the presence of the plaintiff's witnesses over the objection of counsel for the appellants, which objection was on the grounds that the identification of the defendants by said plaintiff's witnesses might be a material point in the defense of the case. (Appellants' Opening Brief, p. 18.)

The appellants admit that they have been unable to find any authorities in support of the above alleged error, but maintain that the prejudice occasioned thereby is so apparent that the citation of authorities seems unnecessary. (Appellants' Opening Brief, p. 21.)

It is difficult to see how they can claim any prejudice as regards the two defendants who were convicted and are now appealing. They do not claim that there was any mistake as to Tony Panzich's being the proprietor of the cafe, nor as to John Arko's having been the head waiter; in fact, John Arko took the stand in his own behalf and testified that he was the head waiter and that his duties were to show patrons to their booths or tables. This is in accord with the testimony of Agents Brooks and Casey, the only conflicting testimony being not as to the identity of John Arko as head waiter, but as to whether he did or did not sell the liquor.

Appellants admit, as was pointed out heretofore, that Tony Panzich was the proprietor of the cafe, and he is

mentioned in the testimony of the Government witnesses only as having been in the cafe on April 30, 1931, at which time Agent Brooks was introduced to him, and on the night of the raid, May 15, 1931, at which time he was arrested, and as having leased the property from the Elks' Club at Santa Monica.

In view of these facts it would seem clear that whether or not it was error on the part of the court to compel the defendants to stand without excluding the witnesses against them, it was not prejudicial error as to the appellants herein.

III.

The Court Did Not Err in Permitting Counsel for the Plaintiff to Cross-Examine the Defendant, John Arko, With Reference to His Employment by the Defendant, Tony Panzich, at a Cafe on East First Street in Los Angeles, California, and With Reference to the Padlocking of Such Cafe by the United States Government.

In support of their contention that there was error in the cross-examination of John Arko, as indicated above, the appellants argued two propositions: (1) that the cross-examination was improper in that it went beyond the scope of the direct examination; and (2) that evidence of other crimes is not admissible to prove the crime charged in the indictment. (Appellants' Opening Brief, p. 22, and following.)

As to the second point, there was no evidence sought nor elicited of any prior crime on the part of either of the appellants. It is true that the question tended to show

that the restaurant on East First street had been padlocked by the Federal officers. Even though it be conceded for the purposes of argument that the inference was that it was abated as a nuisance under the National Prohibition laws, an abatement is a civil and not a criminal proceeding, and there were no questions asked nor testimony given as to the pleas, indictment, or conviction of either of the appellants in any criminal proceeding whatsoever, nor was there any testimony as to the sale or possession of liquor in the East First street restaurant with or without the knowledge of either of the appellants.

Furthermore, even accepting the interpretation placed upon this portion of the testimony by the appellants, the rule is well established that evidence which is relevant to the defendant's guilt is not rendered inadmissible because it proves or tends to prove him guilty of another and distant crime.

16 *Corpus Juris* 588;
Moore v. United States, 150 U. S. 57;
Tucker v. United States, 224 Fed. 833;
Lueders v. United States, 210 Fed. 419;
Jones v. United States, 179 Fed. 584;
Wolfson v. United States, 102 Fed. 134.

"Even though the commission of another offense is thereby shown, evidence of sales other than those charged, or at times not mentioned in the indictment or information, is admissible in a prosecution for keeping a 'blind tiger,' or for unlawfully keeping or running a house or place where intoxicating liquors are kept, stored, sold, or given away in violation of law; but evidence that defendant maintained a liquor

nuisance *some years before* is not admissible, it not being competent to prove other offenses under different circumstances to show that accused is a violator of law generally." (Italics ours.)

16 *Corpus Juris* 607, citing *People v. Bullock,* 173 Mich. 397.

In the instant case the testimony showed that but three months had elapsed between the association of John Arko with Tony Panzich at the East First street restaurant and his association with him at the Good Fellows Inn at Santa Monica.

"In a prosecution for engaging in or pursuing the occupation or business of selling intoxicating liquors in prohibition territory, evidence of sales other than those charged in the indictment is admissible to show that accused was engaged in or pursuing the occupation or business charged. . . . This is true not only as to sales made about the time named in the indictment but even as to sales made a considerable period of time before, where there is evidence showing a continuity of the business; . . ."

16 *Corpus Juris* 606, citing *Dickson v. State,* 66 Tex. Cr. 270, 146 S. W. 914.

"The instances are many in which evidence of the commission of other offenses is necessarily admissible. In *Parker v. United States,* 203 Fed. 950, 952, 122 C. C. A. 252, this court held that where evidence as to other offenses is clearly interwoven with the case on trial it is admissible. . . . And we understand the rule to be that, if intent or motive be one of the elements of the crime charged, evidence of other like

conduct by the defendant at or near the time charged is admissible."

Harris v. United States, 273 Fed. 785, at 791 (C. C. A. 2).

It has also been generally held that it is within the discretion of the court to reject or admit evidence of former acts or occurrences as proof that a particular act was done or a certain occurrence happened.

22 *Corpus Juris* 744;

Barnard v. Bates, 201 Mass. 234, 87 N. E. 472.

As to the contention that the cross-examination was improper as having gone beyond the scope of the direct examination, the rule laid down by the appellants herein would seem to be narrower than that warranted by the authorities.

The Supreme Court of the United States has held in *Wills v. Russel,* 100 U. S. 621, at 625, that:

> "Authorities of the highest character show that the established rule of practice in the Federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, *without leave of the court,* as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements." (Italics ours.)

The court goes on to say that

> "* * * it is equally well settled by the same authorities that the mode of conducting trials, and the

> order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury."

and further

> "* * * nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue."

It is to be noted that the cross-examination objected to in the instant case was not only with the leave of the court, but at the request of the court.

> "The Court: This is a legitimate inquiry made at the request of the court, as you well know . . . ." [Transcript of Record, p. 68.]

This general rule that matters may be brought out in cross-examination which have not been referred to in direct examination, at the discretion of the court, is well stated in 40 *Cyc.* 2506:

> "The rule limiting the cross-examination to the scope of the direct is not absolute, but merely indicates the course which is considered the better practice, leaving the application of the rule in any particular case to the discretion of the trial court, which may depart from such practice and allow the cross-examination to go beyond the scope of the direct when it deems proper, and whose action will not be reviewed on appeal, unless an abuse of discretion is shown."

The case of *Allen v. United States,* 115 Fed. 3, at page 11, decided by this court and relied on by the appellants

herein, is in accord with the principles stated *supra,* and not in accord with the contentions of the appellants. The defendant in that case was indicted for robbery, and cross-examination was permitted as to his gambling and hanging around pool halls and saloons, and prior difficulties he had been in, which had no conceivable connection with the crime for which he was tried. This testimony was admitted for the purpose, as stated by the court (Opinion, p. 7), of showing the habits and character of the defendant prior to the time of the alleged offenses specified in the indictment, and the cross-examination pertaining to these matters covered some thirty pages of the printed record. This court, in reversing the decision of the lower court, said:

> "From the cross-examination of the defendant . . . . . it is apparent that the object of the prosecution was not solely for the purpose of bringing out facts that had any specific relation to the offense alleged against him. It was evidently not for the purpose of impeaching or discrediting him. . . . Of course, if the examination had been confined to these or like purposes, it would have been the duty of the court to have allowed great latitude in the cross-examination of this witness, and the questions allowed would have been largely within the reasonable discretion of the court."

The rule seems clear also that where the direct examination opens up a general subject, the cross-examination may go to any phase of that subject.

Clarke v. Clarke, 133 Cal. 667, 66 Pac. 1037;

Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846;

People v. Maughs, 8 Cal. App. 107, 96 Pac. 407.

Applying the above principles to the facts of the instant case, it is important to analyze the testimony as given in the direct examination of John Arko and that elicited in his cross-examination, and it is important to bear in mind that both of the appellants were charged with having unlawfully *conspired* to commit certain offenses against the United States by selling and possessing large quantities of intoxicating liquor. The charge being a conspiracy and not the substantive offenses of selling and possessing intoxicating liquor, the relation of the defendants to each other, both at the time charged in the indictment and immediately prior thereto, was clearly material.

On direct examination John Arko testified [Transcript of Record, p. 65], that he was employed at Tony's Good Fellows Inn as headwaiter, and that he started to work there when the place was opened; that he was hired by Tony Panzich, and that his duties were merely to seat people at the tables; that he had not sold the Prohibition Agents who testified any whiskey, and that he could not remember whether or not he had seen the Prohibition Agents who testified, prior to his arrest.

The Government's contention was that he was not a mere employee, but was in fact a partner of Tony Panzich in the enterprise. It was clearly material and proper cross-examination to ask any questions which would indicate the existence of a business arrangement between the two other than that of mere employer and employee. In support of this theory on the part of the prosecution, John Arko was questioned concerning a deed given to the Elks' Club as security for the lease, which deed was a deed to Tony Panzich, John Panzich, and John Arko from

the Title Guarantee and Trust Company to certain property in the county of Los Angeles. It is obvious that if he put up part of the security for the lease the logical inference could be drawn that he was a partner in the enterprise rather than an employee. He testified on cross-examination that he had not put up part of the security for the lease, although admitting that his name appeared on the deed. In that state of the evidence it would seem proper to permit examination as to the circumstances under which the deed was executed and the relationship of Tony Panzich and John Arko at that time. Accordingly, he admitted in reply to questions put by the attorney for the prosecution, that this land was bought by the grantees at a time when they were working together in another restaurant. It would seem to be within the discretion of the court to permit questions as to the relationship of the two at the time when the land was bought and up to the time the deed was given as security for the lease for the purpose of showing that in fact the two appellants were principals throughout. John Arko testified that at the time this property was bought he was working for Tony Panzich in the restaurant on East First street, and that he could not remember whether or not it was padlocked, nor if it was padlocked when it was padlocked, but that immediately after the place on East First street was closed, Tony Panzich moved down to Santa Monica, and as nearly as he could remember it about three months elapsed between the time he stopped working on First street and the time he started working at Santa Monica.

There are several theories under which this testimony was properly admissible, one being that it grew out of and tended to impeach his testimony on direct examination

that he was merely the head waiter and employee of Tony Panzich; and another being that this testimony showed a continuing enterprise, and that the fact of an involuntary closing of the restaurant on East First street was material as carrying with it an inference that there had been no alteration in the relationship between Tony Panzich and John Arko, but that to all intents and purposes the Good Fellows Inn at Santa Monica might be considered as one and the same enterprise as the restaurant on East First street.

While the fact that Tony Panzich, John Panzich, and John Arko bought property jointly at a time when they were associated in the restaurant business together would not of itself indicate that their relations at that time were any other than employer and employee, taken in conjunction with the fact that this deed was put up as security for the lease at Santa Monica it might be considered as of some import in determining the relationship between the two.

It is also the contention of the Government that the padlocking of the premises on East First street might have been introduced independently of any theory of partnership, to show knowledge and intent on the part of the appellants herein of the possession and sale of liquor at Santa Monica, by reason of the fact that there is a clear inference that the reason for establishing another restaurant than the one on East First street was the involuntary closing of that restaurant.

It is admitted that had several years elapsed between the closing of the first restaurant and the opening of the second, that the closing of the first could not be used as

evidence, but the principles stated *supra* and supported by authority support the admissibility of this evidence in view of the fact that the Santa Monica restaurant was opened almost immediately after the closing of the restaurant on First street.

If the evidence of the padlocking of the First street restaurant was admissible at all, independent of its bearing upon the direct examination of the defendant John Arko, the authorities indicate that it was within the discretion of the court to permit that matter to be brought out on cross-examination.

For these reasons, it is respectfully submitted that the decision of the District Court should be affirmed.

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